although a number of legal issues were argued and submitted by counsel the judge may decide on one obscure point and decide the appeal solely on that point without considering the other issues raised in the appeal before him.

Therefore an applicant for leave under s 66(1) of the Act must satisfy the court that the question of law of public interest arose in the course of the appeal and the determination of that question had affected the event of the appeal. The easiest way to satisfy the court that this particular requirement of s 66(1) of the Act has been satisfied is to provide the court with the written judgment or grounds of decision of the learned judge or if it is not available to provide at least the certified notes of proceedings if it is clearly indicated therein that that particular point was in fact raised, determined and had affected the event of the appeal.

It hardly needs to be emphasized that in an application for leave under s 66 of the Act the court should adopt an attitude of reluctance and be slow in granting leave. This attitude was clearly indicated in *Tan Yin Yen* v *PP*[1] and *A Ragunathan* v *PP*.[2] The basis for this attitude is to ensure that an application for reference does not become an appeal in disguise which is not the intention of s 66(1) of the Act.

For the above reasons the notice of motion was adjourned to another date to be fixed by the senior assistant registrar to enable the applicant to provide the court with a written judgment of the learned appellate judge or if it is not available, the certified notes of proceedings to indicate that the questions raised were actually determined and had affected the event of the appeal.

Under sub-s (2) of s 66, the application for leave shall be made within one month or such longer time as the Supreme Court may permit of the determination of the appeal to which it relates. In order to comply with this provision, the application for leave must be filed within one month or such longer period as the court may allow. However, if at the time of application the written judgment of the appellate judge or the certified notes of proceedings are not applicable, the affidavit supporting the notice of motion should, as a matter of procedure, state the unavailability of either document and that it will be filed as soon as it is available to enable this court to fix the date of hearing of the application.

Application dismissed.

Solicitors: *Low Hop Bing & Associates; Jagjit Singh & Co.*

Reported by *Prof Ahmad Ibrahim*

Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director General of Trade Unions & Ors

HIGH COURT (PENANG) — CIVIL SUIT NO 22-267-89
EDGAR JOSEPH JR J
28 JUNE 1990

Administrative Law — Registration of trade unions — Trade union seeking to organize workers — Rival union obtaining registration by Director General of Trade Unions — Breach of rules of natural justice — Whether trade union should have been offered opportunity to make representations — Allegations of conspiracy — Whether proper procedure is to appeal against order for registration — Whether writ action against Director General of Trade Unions is proper — Jurisdictional error — Whether preclusive provisions of statute bar suit — Industrial Relations Act 1967, ss 9(4B)(b) & 11 — Trade Unions Act 1959

Civil Procedure — Appeal — Decision of Director General of Trade Unions — Provision in statute for appeal — Writ action commenced against Director General — Whether proper — Trade Unions Act 1959

Civil Procedure — Interlocutory injunction — Balance of convenience — Preservation of status quo — Hardship

Civil Procedure — Pleadings — Striking out — Principles applicable — Rules of the High Court 1980, O 18 r 19

Labour Law — Registration of trade unions — Trade union seeking to organize workers — Rival union obtaining registration by Director General of Trade Unions — Natural justice — Whether trade union should have been offered opportunity to make representations — Allegations of conspiracy — Whether proper procedure is to appeal against order for registration — Whether writ action against Director General of Trade Unions is proper — Breach of rules of natural justice — Jurisdictional error — Whether preclusive provisions of statute bar suit — Industrial Relations Act 1967, ss 9(4B)(b) & 11 — Trade Unions Act 1959

Words and Phrases — 'Frivolous and vexatious' — Rules of the High Court 1980, O 18 r 19

The plaintiff had served a claim for recognition on the second defendant pursuant to s 9(2) of the Industrial Relations Act 1967. The second defendant's objection addressed to the first defendant, the Director General of Trade Unions, resulted in a ruling by him that the plaintiff was competent to organize and represent the workers in the second defendant's factory other than those in certain excluded categories. The plaintiff also contended that it was competent to represent the workers employed by the third defendant. The second defendant had appealed to the Minister of Labour against the ruling. However, the plaintiff withdrew its claim for recognition addressed to the second defendant on the advice of the Director General of Trade Unions when a membership check carried out by him revealed that the plaintiff's members had not signed the membership forms. The plaintiff later complained to the Industrial Relations Department that the second defendant was trying to influence or instigate the plaintiff's members in the factory to resign from the plaintiff union, leading the department to act on the complaint. Subsequently, the plaintiff informed the Director General of Trade Unions that it was in the process of receiving applications

for membership from workers in the second defendant's factory. The plaintiff's claim for recognition which followed was rejected by the second and the third defendants. The plaintiff claimed that while it was in the process of organizing the workers and awaiting a reply from the second and the third defendants on its claim for recognition, the Director General of Trade Unions had registered the fourth defendant, which was an in-house trade union as a trade union under the Trade Unions Act 1959. The in-house union's claims for recognition were accepted by the second and the third defendants, the effect of which, pursuant to s 11 of the Industrial Relations Act 1967, was to prevent the plaintiff from seeking recognition unless a period of three years had elapsed from the date of such recognition. The plaintiff also alleged that the agents and servants of the second and the third defendants had been interfering with the rights of the workmen in the said factories to join a union of their choice by inducing and coercing them not to join a national union but to join the in-house union. The plaintiff also alleged that the in-house union which had been promoted by the second and the third defendants for their own interest was not an independent union which could genuinely and effectively represent the interest of the workers. The plaintiff also alleged that the Director General of Trade Unions and the second and the third defendants had wrongfully and maliciously conspired to frustrate the plaintiff's efforts at organizing the workers and to injure the interests of the plaintiff and its members.

The plaintiff claimed various declarations and injunctions in the action and obtained, on an ex parte application, injunctions against the in-house union and the second and the third defendants so as to restrain the in-house union from, inter alia, recruiting members, and to restrain the second and the third defendants from, inter alia, interfering with the right of their employees to join the plaintiff union and causing their employees to become members of the in-house union.

The second and the third defendants and the in-house union applied for an order to strike out the writ of summons and the statement of claim pursuant to O 18 r 19 of the Rules of the High Court 1980 as disclosing no reasonable cause of action, as being scandalous, frivolous, vexatious and an abuse of the process of the court; alternatively, for dissolution of the injunctions. The grounds raised in support of the applications were:

(1) the plaintiff had withdrawn its claim for recognition;
(2) the plaintiff should have reported to the Director General of Industrial Relations the refusal of their claim for recognition, as provided in the Industrial Relations Act 1967, after which he could refer the matter to the minister for a decision, which decision shall be final;
(3) the action was premature in that the plaintiff could not make a claim for recognition unless a period of three years had elapsed after the recognition of the in-house union or the in-house union had ceased to exist;
(4) if the plaintiff was dissatisfied with the Director General of Trade Union's decision to register the in-house union, the plaintiff's remedy was to appeal against the same; and
(5) having regard to the balance of convenience, the interlocutory injunctions should be dissolved since their effect was to immobilize the in-house union.

Held, dismissing the second and the third defendants' applications:

(1) It was certainly arguable that the plaintiff could invoke the concept of legitimate expectation of being afforded the opportunity of making representations before the Director General of Trade Unions proceeded to register the in-house union as a trade union. Accordingly, the plaintiff had the necessary locus standi to maintain the present suit against the Director General of Trade Unions. Similarly, the allegations of conspiracy against the Director General of Trade Unions and the second and the third defendants disclosed a cause of action against them and so constituted a sufficient basis for locus standi to enable the plaintiff to maintain the suit against them also. As for the in-house union, it would naturally be affected should the plaintiff succeed in obtaining the declaration that its registration as a trade union was a nullity. As such, the in-house union was a necessary party to the proceedings and so the statement of claim clearly disclosed a cause of action against it.

(2) The procedure laid down in the Industrial Relations Act 1967 regarding notification to the Director General of Industrial Relations of non-recognition of a trade union was not the only remedy available and so the dissatisfied union may resort to a writ action for a declaration in the High Court.

(3) Generally the courts consider the existence of an alternative remedy or system as a factor in the exercise of their discretion to refuse relief. In the present case, there were serious allegations of conspiracy against the Director General of Trade Unions and the second and the third defendants. In view of this, the advantage of oral evidence, cross-examination, discovery and interrogatories could not be over emphasized. These facilities would be available as a matter of right in a writ action in court but would not be available if recourse was had to the procedure laid down in the Industrial Relations Act 1967.

(4) The Director General of Industrial Relations may by s 9(4B)(b) of the Industrial Relations Act 1967 refer to the Director General of Trade Unions for his opinion any question on the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded. In the present case, the undesirability of such a reference must be self-evident.

(5) If the plaintiff was correct in its contention that there had been a breach of the rules of natural justice in the circumstances outlined, then there would have been a jurisdictional error rendering the registration of the in-house union as a trade union a nullity and void ab initio.

(6) The objection that the preclusive provisions of s 11 of the Industrial Relations Act 1967 barred the plaintiff's suit will be of no avail where the decision is a nullity and void ab initio because it was made contrary to the rules of natural justice.

(7) On the advice of the Director General of Trade Unions, the plaintiff had withdrawn its claim for recognition but it was said that while the plaintiff was in the process of organizing the workers and awaiting a reply on its claim for recognition, the Director General of Trade Unions had registered the in-house union as a trade union. If this version of the facts were true — which could only be determined at the final hearing — there may well be substance in the submissions that the Director General of Trade Unions had acted in breach of the rules of natural justice and therefore in excess of jurisdiction.

(8) When, as here, it is alleged that a decision is a nullity, a plaintiff is not bound to resort to the remedy of an appeal but may instead have recourse to collateral proceedings to attack the decision.

(9) On an application to strike out the statement of claim and to dismiss the action, it is not permissible to try the action on affidavits when the facts are in dispute. The plaintiff's allegation of conspiracy had been denied by the Director General of Trade Unions and the second and the third defendants.

(10) The summary procedure under O 18 r 19 can only be adopted where it can be clearly seen that the claim or answer is on the face of it obviously unsustainable.

(11) The power to strike out any pleading or any part of a pleading under O 18 r 19 is not mandatory but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality of and all the circumstances relating to the offending plea.

(12) By the words 'frivolous and vexatious' are meant cases which are obviously frivolous and vexatious or obviously unsustainable. The pleading must be so clearly frivolous that to put it forward must be an abuse of the process of the court.

(13) If the injunctions were discharged and the plaintiff were to succeed at the final hearing irreparable damage might be caused to the plaintiff and the actions of the in-house union as a trade union pending the hearing must surely be open to challenge. There were sufficient grounds for continuing in force the injunctions, thus preserving the status quo until the plaintiff's claims were adjudicated upon by the court.

[*Editorial Note*: The second and third defendants have appealed to the Supreme Court vide Civil Appeal No 02-160 of 1990.]

Cases referred to

1 *Manggai* v *Government of Sarawak* [1970] 2 MLJ 41 (refd)
2 *Schmidt* v *Secretary of State for Home Affairs* [1969] 2 Ch 149 (folld)
3 *JP Berthelsen* v *Director General of Immigration Malaysia & Ors* [1987] 1 MLJ 134 (folld)
4 *O'Reilly* v *Mackman* [1983] 2 AC 237 (folld)
5 *Re Findlay* [1985] AC 318 (folld)
6 *Council of Civil Service Unions* v *Minister for the Civil Service* [1985] AC 374 (folld)
7 *Pyx Granite Co Ltd* v *Ministry of Housing and Local Government* [1960] AC 260 (folld)
8 *North Sydney Municipal Council* v *Comfytex Pty Ltd* [1975] 1 NSW LR 447 (folld)
9 *Wilkinson* v *Barking Corp* [1948] 1 KB 721 (refd)
10 *Cooper* v *Wilson* [1937] 2 KB 309 (refd)
11 *Sutherland Shire Council* v *Leyendekkers* (1970) 91 WN (NSW) 250 (refd)
12 *Forster* v *Jododex Australia Pty Ltd* (1972) 127 CLR 421 (refd)
13 *Tanjong Jaga Sdn Bhd* v *Minister of Labour and Manpower* [1987] 1 MLJ 124 (folld)
14 *Anisminic Ltd* v *Foreign Compensation Commission* [1969] 2 AC 147 (folld)
15 *Harkness* v *Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729 (folld)
16 *Eu Finance Bhd* v *Lim Yoke Foo* [1982] 2 MLJ 37 (folld)
17 *Wenlock* v *Moloney* [1965] 1 WLR 1238 (folld)
18 *A-G of Duchy of Lancaster* v *L & NW Rly* [1892] 3 Ch 274 (refd)
19 *Dyson* v *A-G* [1911] 1 KB 410 (folld)
20 *Carl Zeiss Stiftung* v *Rayner & Keeler Ltd (No 3)* [1970] Ch 506 (folld)
21 *Hampshire Country Council* v *Shonleigh Nominees Ltd* [1970] 1 WLR 865 (refd)
22 *Young* v *Holloway* [1895] P 87 (folld)

Legislation referred to

Industrial Relations Act 1967 ss 9, 11
Trade Unions Act 1959 s 71A
Rules of the High Court 1980 O 18 r 19
Town and Country Planning Act 1947 [UK] s 171(1)

Mohideen Abdul Kader for the plaintiff.
Mohd Yusof bin Johor Ali (Senior Federal Counsel) for the first defendant.
DS Dorairaj for the second and the third defendants.
Andrew Lim Tatt Keong for the fourth defendant.

Cur Adv Vult

Edgar Joseph Jr J: These were two applications to strike out a writ of summons and statement of claim pursuant to O 18 r 19 of the Rules of the High Court 1980 as disclosing no reasonable cause of action, as being scandalous, frivolous, vexatious and an abuse of the process of the court and, alternatively, for dissolution of certain ex parte interlocutory injunctions.

The applications arose out of a suit by the plaintiff, a registered trade union, established in 1963, whose objects were and are to secure the organization and promotion of the welfare of workers employed in companies manufacturing non-metallic mineral products including structural clay products. The plaintiff cited four defendants in the suit; being, the Director General of Trade Unions, the first defendant, Franklin Porcelain Sdn Bhd and Franklin Mint Porcelain Manufacturing Sdn Bhd, the second and the third defendants, respectively, who have two factories at Kulim Industrial Estate, Kulim, Kedah, and are said to employ more than 3,000 workers and produce porcelain ceramic products, and Kesatuan Pekerja-Pekerja Kumpulan Syarikat Franklin Porcelain, the fourth defendant, an in-house union.

It was said that the factory of the third defendant came into operation sometime in early 1989 and some of the processes carried out by the second defendant were transferred to the third defendant.

For the sake of brevity and convenience, unless the context otherwise requires, all references herein to sections are to the Industrial Relations Act 1967 ('the Act').

On 7 March 1988, the plaintiff, pursuant to s 9(2) of the Act served a claim for recognition on the second defendant who addressed an objection to the first defendant on the ground of lack of competence, but the former, after investigating the matter, made a ruling contained in a letter dated 9 June 1988 that the plaintiff was competent to organize and represent the workers in the second defendant's factory other than those in certain excluded categories. But the plaintiff also contends that it is competent to represent the workers employed by the third defendant.

Be that as it may, the second defendant by a letter dated 17 June 1988 had appealed to the Minister for Labour ('the minister') against the ruling of the first defendant aforesaid.

However, it was further said that when the first defendant carried out a membership check it was discov-

ered that the membership forms were not signed by the members themselves, so the plaintiff withdrew its claim for recognition addressed to the second defendant on the advice of the first defendant.

But, by a letter dated 7 July 1988, the plaintiff complained to the Jabatan Perhubungan Perusahaan that the second defendant was trying to influence or instigate the union members in the factory to resign from the plaintiff union, whereupon, that body decided to act on the complaint.

The next event of significance, according to the plaintiff, occurred on 20 March 1989, when about 2,000 workers from the factory staged a walkout because they were dissatisfied with, amongst other grievances, the low wages and forced overtime.

Then, by a letter dated 3 April 1989, the plaintiff informed the first defendant that they were in the process of receiving applications from the workers in the second defendant's factory to become members of the plaintiff union.

Next, by a letter dated 4 May 1989, the plaintiff submitted a claim for recognition to the second and the third defendants but they had by letter dated 23 May 1989 declined to do so.

On 17 May 1989, the plaintiff claimed that whilst it was in the process of organizing the workers in the factory and awaiting a reply from the second and the third defendants on its claim for recognition, the first defendant registered the fourth defendant — an in-house union — as a trade union under the Trade Unions Act 1959.

On 18 May 1989, the fourth defendant served on the second and the third defendants claims for recognition and, on the next day, the second and the third defendants accorded it recognition, the effect of which was, of course, to prevent the plaintiff from seeking recognition unless a period of three years has elapsed from the date of such recognition (s 11).

It was further alleged by the plaintiff that the agents and servants of the second and the third defendants had been interfering with the rights of the workmen in the said factories to join a union of their choice by inducing and coercing them not to join a national union but to join the fourth defendant, an in-house union. Substantial particulars in support of this allegation have been set out in the statement of claim which need not be reproduced here but, it is sufficient to say that, if true, they would afford a sufficient basis for the allegation of interference.

It was further alleged by the plaintiff that the fourth defendant, which had been promoted by the second and the third defendants for their own interest, is not an independent union which can genuinely and effectively represent the interests of the workers in the said factories.

Next, it was alleged by the plaintiff that between December 1988 and May 1989, the first, the second and the third defendants and certain named individuals wrongfully and maliciously conspired to frustrate the plaintiff's efforts at organizing the workers in the said factories and thereby to injure the interests of the plaintiff and its members. Again, substantial particulars, in support of this allegation have been set out in the statement of claim, which need not be reproduced here, but which if true, would afford a sufficient basis for the allegation of conspiracy.

By reason of the matters hereinbefore mentioned, the plaintiff has, by its statement of claim, prayed for:

(1) a declaration that the registration of the fourth defendant as a trade union by the first defendant is a nullity on a number of grounds; to wit, the first defendant had, in effecting such registration, not given the plaintiff an opportunity of being heard, had acted unfairly, capriciously abused his powers and in contravention of the Trade Unions Act 1959;

(2) a declaration that the recognition accorded to the fourth defendant by the second and the third defendants is a nullity;

(3) a declaration that the second and the third defendants by interfering with the rights of their employees to become members of the plaintiff union and, by promoting the interests of the fourth defendant, had acted in violation of the Act;

(4) an injunction to restrain the fourth defendant whether by itself, its servants or agents or otherwise howsoever, from doing the following acts or any of them; that is to say, recruiting, persuading or inducing or organizing the workers in the second and the third defendants' factories to become members of the fourth defendant union or collecting money and carrying out trade union activities;

(5) an injunction to restrain the second and the third defendants whether by themselves their servants or agents or otherwise howsoever from interfering with the rights of their employees in the said factories to join the plaintiff union and from persuading, inducing, threatening or coercing them to become members of the fourth defendant union.

On 11 January 1990, upon an application by summons in chambers (encl 2), the plaintiff was granted interlocutory injunctions:

(a) restraining the fourth defendant whether by itself, its servants or agents or otherwise howsoever, from doing the following acts or any of them, that is to say, recruiting, persuading or inducing or organizing the workers' in the second and the third defendant's factories to become members of the fourth defendant union or collecting money and carrying out other trade union activities;

(b) restraining the second defendant and the third defendant whether by themselves, their servants or agent or otherwise howsoever, from interfering with the rights of their employees in the said factories to join the plaintiff union and from persuading, inducing, threatening or coercing them to become members of the fourth defendant union.

Counsel for the second and the third defendants argued (with the support of counsel for the fourth defendant though not with that of counsel for the first defendant, who discontinued his own application to strike out) that the plaintiff had no locus standi, and therefore had no cause of action on four separate grounds, namely:

(a) the plaintiff had withdrawn its claim for recognition under s 9(2) of the Act;
(b) the plaintiff having received from the second and the third defendants a notification under s 9(3)(b) of the Act, refusing to accord recognition to it, should have availed itself of the procedure laid down in the Act by reporting the matter to the Director General of Industrial Relations, the first defendant (s 9(4)), who would then have taken such steps or made such enquiries as he might have considered necessary to resolve the matter (s 9(4A)), failing which, he would have notified the minister who would then have made a decision on such notification (s 9(5)) and whose decision would be final (s 9(6));
(c) the fourth defendant having been accorded recognition, no other trade union could make a claim for recognition in respect of the same class of workmen unless a period of three years has elapsed after such recognition or the fourth defendant has ceased to exist (s 11) yet the plaintiff had issued its writ before expiry of this period;
(d) if the plaintiff was dissatisfied with the decision of the Director General Trade Unions made on 17 May 1989, in issuing a certificate of registration to the fourth defendant, its remedy was to appeal against the same under the provisions of s 71A of the Trade Unions Act 1959, yet it did nothing of the sort. (See *Manggai* v *Government of Sarawak*.[1])

In addition, counsel for the fourth defendant, took the point that in any event, having regard to the balance of convenience, the interlocutory injunctions hereinbefore mentioned should be dissolved, since their effect was to immobilize the fourth defendant.

I must now address the issues which arose for decision. Actions for declaratory relief have given rise to much discussion of the law of standing. Declaratory actions in the constitutional field are examples to which many others may be added.

In traditional litigation between individuals involving contract or tort, the question of a plaintiff's standing to sue is usually subsumed within the concept of 'cause of action'. If the plaintiff alleges a 'cause of action', standing goes without saying.

The gist of the plaintiff's alleged cause of action against the first defendant revolves around the allegation of a failure of natural justice when the first defendant registered the fourth defendant as a trade union. In particular, it was said that the first defendant did not give the plaintiff, which was at the material time organizing workers in the factories concerned, and had served on the second and the third defendants claims for recognition, an opportunity of being heard.

A concept which has been evolved by the courts to assist in identifying interests which do not constitute rights in the strict sense but nevertheless deserve legal recognition is the concept of legal expectation. It was in the case of *Schmidt* v *Secretary of State for Home Affairs*[2] that Lord Denning first applied this concept. Schmidt was an alien who had been given leave to enter the United Kingdom and study scintology for a limited period. Once that period came to an end, Schmidt applied for an extension but this was refused by the Home Secretary without Schmidt being given the opportunity to make representations. Schmidt sought a declaration that he ought to have been afforded that opportunity. The Court of Appeal, however, held against him. Lord Denning enunciated the general principle as follows:

> The speeches in *Ridge* v *Baldwin* [1964] AC 40 show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest or, *I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say*. (Emphasis added.)

Schmidt had no right or legitimate expectation since he had been allowed to remain in the United Kingdom for the full period of time granted to him. However, Lord Denning indicated that the position would have been different had Schmidt's permit been revoked before the time had expired, for then he would have a legitimate expectation of being allowed to stay. A similar approach had been adopted by our Supreme Court in *JP Berthelsen* v *Director General of Immigration, Malaysia & Ors*.[3]

Since *Schmidt*'s case,[2] the concept of legitimate expectation as conferring a sufficient basis to found locus standi in judicial review proceedings has been recognized by the House of Lords in *O'Reilly* v *Mackman*[4] and later in *Re Findlay*.[5] So too the concept was applied in *Council of Civil Service Unions* v *Minister for the Civil Service*.[6] In that case the minister issued instructions that the terms and conditions of service of staff at GCHQ should be varied so that they would no longer be permitted to belong to national trade unions. There was no consultation with the trade unions representing the staff notwithstanding a well

established practice of consultation. The unions alleged that in failing to consult before such variations were effected the minister had been in breach of her duty to act fairly. The House of Lords rejected this allegation on the grounds that on the facts the interests of national security outweighed those of fairness. However, they unanimously agreed that, apart from considerations of national security, the invariable practice of consultation was such as to create a legitimate expectation that the unions would be consulted.

Applying these principles to the facts disclosed in the statement of claim, I was satisfied that it was certainly arguable that the plaintiff could invoke the concept of legitimate expectation of being afforded the opportunity of making representations before the first defendant proceeded to register the fourth defendant as a trade union. Accordingly, in my view the plaintiff had the necessary locus standi to maintain the present suit against the first defendant.

Similarly, the allegations of conspiracy involving the first, the second and the third defendants disclosed a cause of action against them and so constituted a sufficient basis for locus standi to enable the plaintiff to maintain the present suit against them also.

As for the fourth defendant, it would naturally be affected should the plaintiff succeed in obtaining the declaration that its registration as a trade union by the first defendant was a nullity. As such, it goes without saying that the fourth defendant is a necessary party to these proceedings and so the statement of claim clearly disclosed a cause of action against it. The plaintiff thus had the necessary locus standi to maintain the present suit against the fourth defendant as well.

As regards the point that the plaintiff should have availed itself of the procedure laid down in s 9(3), 9(4), 9(4A) and 9(5) of the Act rather than instituted the present suit for declarations, I would say this: In *Pyx Granite Co Ltd* v *Ministry of Housing and Local Government*,[7] an Act provided a statutory scheme for the resolution of disputes concerning the rights of the plaintiff quarry operator. The plaintiff sought a declaration that it was entitled to quarry certain land. Viscount Simonds said at p 266:

> It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words.

And this is what Street CJ said in *North Sydney Municipal Council* v *Comfytex Pty Ltd*[8] at p 450:

> A case such as the present involves principles differing from those applied in a situation in which the legislature creates a new right and sets out express statutory machinery for the vindication of that right between citizens. It may well be that in this last-mentioned field, a superior court will proceed with some care before entertaining disputes. But, even in such cases, the history of reading down the privative clause, the supervision exercised through the prerogative writs, and more recently the use of the declaratory jurisdiction, demonstrate recognition by the superior courts of the necessity within our system of justice to preserve in themselves a full and ample jurisdiction. The width of the jurisdiction inherent in a superior court is commensurate with the ultimate responsibility of such a court to the community. Being the court charged with unlimited civil and criminal jurisdiction, and bearing the duty of presiding over the whole system of justice, a superior court will not recognise legislative limitations on its powers, unless those limitations are express.

The question therefore whether a prescribed remedy and procedure exclude resort to the declaratory jurisdiction of the High Court may be answered by applying the ordinary rules of construction. Support for this view may be found by contrasting cases where though the circumstances were similar, different conclusions were reached due to the application of such rules of construction. So, in one case — *Wilkinson v Barking Corp*[9] — where a statute provided that a certain class of question 'shall' he adjudicated by a specific tribunal, it was held that the jurisdiction of the court to declare upon any question falling within that class was ousted. On the other hard, in *Cooper* v *Wilson*,[10] in which the facts were very similar, the statute only provided that an aggrieved person 'may' seek relief in a specific way, and it was held that the court had jurisdiction to entertain a claim for declaration by such a person.

Similarly, in the *Pyx Granite* case,[7] the significance of 'may' and 'shall' was discussed. There s 17(1) of the Town and County Planning Act 1947 fell to be construed; it read as follows:

> If any person who proposes to carry out any operations on land ... wishes to have it determined ... whether an application for permission in respect thereof is required ... he may ... apply to the local planning authority to determine that question:

The question for decision was whether the procedure prescribed by the Act was exhaustive. Lord Denning who presided in the Court of Appeal said this: 'It is not the only remedy. Section 17 says that 'he may' apply to the local planning authority, not that he *must* do so.'

Lord Morris who sat with him shared the same opinion, and observed 'that the wording of s 17 denotes that an option is given to seek a determination by the use of a procedure of the section, but the right that is given is not to the exclusion of any other rights'.

Applying these principles to this particular objection, I must, first of all, reproduce either wholly or partly the material portions of s 9(3)(b), (4), (4A), (4B), (4C), (5) and (6); they read as follows:

> 9(3) An employer or a trade union of employers upon whom a claim for recognition has been served shall, within twenty-one days after the service of the claim —
>
> (a) ...

(b) if recognition is not accorded, notify the trade union of workmen concerned in writing the grounds for not according recognition;

9(4) Where the trade union of workmen concerned receives a notification under subsection (3)(b), ... the trade union of workmen may report the matter in writing to the Director General.

9(4A) The Director General, upon receipt of ... a report under subsection (4) may take such steps or make such enquiries as he may consider necessary or expedient to resolve the matter.

9(4B) For the purpose of carrying out his functions under sub-section (4A) the Director General —

(a) ...
(b) may refer to the Director General of Trade Unions for his decision any question on the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded, and the performance of duties and functions by the Director General of Trade Unions under this paragraph shall be deemed to be a performance of his duties and functions under the written law relating to the registration of trade unions

9(4C) Where the matter is not resolved under subsection (4A) the Director General shall notify the Minister.

9(5) Upon receipt of a notification under subsection (4C) the Minister shall give his decision thereon ...

9(6) A decision of the Minister under subsection (5) shall be final and shall not be questioned in any court.

Clearly, the all important provision here is 9(4) which provides explicitly that where a trade union receives a notification of non-recognition under s 9(3B), it '*may*' report the matter in writing to the Director General. Accordingly, I would hold that as a matter of construction, the procedure laid down in this particular statute is not the only remedy available and so the dissatisfied union may resort to a writ action for a declaration in the High Court.

But, having said that, I would add that generally the courts consider the existence of an alternative remedy or system as a factor in the exercise of their *discretion* to refuse relief. The cases can be categorized as those in which there is a whole system which would be by-passed if a declaration were granted and those in which there is an alternative judicial remedy to the declaration.

The 'system' cases present the greater difficulty. The answer to the question: when should a court of general jurisdiction accept a case which can be decided by an alternative body or tribunal set up especially to hear that sort of case is, one must balance the utility of seeking a declaration in a particular case against regarding 'the machinery of a declaration as a device capable of being used to strike, at the roots of other established jurisdictional structures'. (Per Street CJ in *Sutherland Shire Council* v *Leyendekkers*[11] at p 259.) As the context varies from time to time so will the balance struck vary. Obviously, the court will have to consider several factors such as: is the issue presented to it one of fact or law? If the latter, is the court as well equipped to determine the issue as the alternative form? Would the court's lists become unmanageable if it were to take this and like cases? And so on.

In *Forster* v *Jododex Australia Pty Ltd*,[12] the plaintiff got a declaration as to a matter which, in the normal course of events, would have been heard by a mining warden.

In the present case, there are serious allegations of conspiracy against the first, the second and the third defendants. In particular, it is alleged that they conspired with others to frustrate the plaintiff's efforts to organize workers in the factories concerned and thereby injure the interests of the plaintiff union and its members. In view of this, the advantage of oral evidence, cross-examination, discovery and interrogatories cannot be overemphasized. These facilities would be available as a matter of right in a writ action in court, but would not be available if recourse is had to the procedure laid down in the Act. To illustrate, I would point out that s 9(4A) (reproduced above) provides, inter alia, that the Director General of Industrial Relations upon receipt of a report from the dissatisfied trade union may take such steps or make such inquiries as he may consider necessary or expedient to resolve the matter. Then, by s 9(4B)(a), for purposes of carrying out his functions under s 9(4A), he shall have power to require the trade unions of workmen concerned and the employer to furnish such information as he may consider necessary.

And, an important point to note in the context of this case is that the Director General of Industrial Relations may, by s 9(4B)(b), refer to the Director General of Trade Unions (who is the first defendant and one of the persons against whom the charge of conspiracy has been levelled by the plaintiff) for his opinion any question on the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded. In the present case, the undesirability of such a reference must be self-evident.

For all these reasons, in the exercise of my discretion, I considered that the plaintiff's suit should be entertained by this court notwithstanding the existence of a prescribed remedy and procedure laid down in the Act.

Another provision, relied on by counsel for the first, the second and the third defendants was s 9(6) of the Act, which reads 'A decision of the Minister under sub-section (5) shall be final and shall not be questioned in any court'. All I need say as to this is that it is ineffective as regards jurisdictional review (see *Tanjong Jaga Sdn Bhd* v *Minister of Labour and Manpower*[13] at p 131). If the plaintiff is correct in its contention that there had been a breach of the

rules of natural justice in the circumstances outlined, then there would have been a jurisdictional error rendering the registration of the fourth defendant as a trade union a nullity and void ab initio. (See *Anisminic Ltd* v *Foreign Compensation Commission*[14] at p 171 and p 195 where the House of Lords observed, inter alia, that a tribunal having jurisdiction in the first instance might exceed its jurisdiction by breaking the rules of natural justice.) In the present case, the plaintiff has alleged a breach of the rules of natural justice and if it establishes this at the final hearing the recognition afforded to the fourth defendant would be a nullity and void ab initio.

As regards the point that the plaintiff's suit is barred by the preclusive provisions of s 11 of the Act which provide that where a trade union has been accorded recognition whether by a decision of the minister or otherwise, no other trade union shall make any claim for recognition in respect of the same workmen, this objection is only available where the decision according recognition is legally valid. It will be of no avail where the decision is a nullity and void ab initio because it was made contrary to the rules of natural justice. Such a failure makes the decision according recognition a nullity and void ab initio.

Having regard to my views aforesaid, I did not see anything in the point that because the plaintiff had withdrawn its claim for recognition, the whole basis of its suit had gone. Furthermore, the plaintiff had attempted to explain on affidavit (with contemporary correspondence annexed) why it did so; namely, that when the first defendant had carried out a membership check, it was discovered that membership forms were not signed by members themselves. On the advice of the first defendant, the plaintiff withdrew its claim for recognition but, it was said that while the plaintiff was in the process of reorganizing the workers in the two factories and awaiting a reply from the second and the third defendants on its claim for recognition, the first defendant had on 17 May 1989 registered the fourth defendant as a trade union under the Trade Unions Act 1959. If this version of the facts were true — and this, of course, can only be determined at the final hearing — there may well be substance in the submission that the first defendant had acted in breach of the rules of natural justice and therefore in excess of jurisdiction.

As for the point that the plaintiff should have availed itself of the remedy of appeal provided for in the Trade Unions Act 1959, I propose disposing of this ground by referring to the well known line of authorities which establish the proposition that when, as here, it is alleged that a decision is a nullity, a plaintiff is not bound to resort to the remedy of an appeal but may instead have recourse to collateral proceedings to attack the decision.

In *Harkness* v *Bell's Asbestos and Engineering Ltd*,[15] Lord Diplock stated the general rule at p 736, thus:

> It has long been laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside.

This general rule was cited with approval by Abdoolcader J at p 39 when speaking for the Federal Court in *Eu Finance Bhd* v *Lim Yoke Foo*[16] and he added:

> ... where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be attacked in collateral proceedings, before any court or tribunal and whenever it is relied upon — in other words it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent.

And, in the next paragraph, he dealt with the failure to take advantage of the remedy of appeal where the impugned order is a nullity in the following words:

> Where a decision is null by reason of want of jurisdiction, it cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal 'but he is not bound to [do so], because he is at liberty to treat the act as void'. (*Birmingham (Churchwardens and Overseers)* v *Shaw* (1849) 10 QB 868; 116 ER 329 at p 880 per Denman CJ).

For the sake of completeness, I think I should conclude this judgment by referring to the well known principles which apply in applications to strike out a writ of summons and statement of claim.

Firstly, on an application to strike out the statement of claim and to dismiss the action, it is not permissible to try the action on affidavits when the facts are in dispute (*Wenlock* v *Moloney*[17]).

In the present case, for example, the allegation made by the plaintiff on affidavit against the first, the second and the third defendants that there was the conspiracy on their part hereinbefore mentioned, had been denied by them on affidavit, so it was clearly not permissible for me to try this question on affidavits. Indeed, where the only ground on which an application to strike out is made is that the pleading discloses no reasonable cause of action under O 18 r 19 no evidence is admitted (see *A-G of Duchy of Lancaster* v *L & NW Rly*[18]). But, in an application to strike out on any of the other grounds mentioned in the rule or under the inherent jurisdiction of the court affidavit evidence may be and is ordinarily used.

Secondly, the summary procedure under O 18 r 19 can only be adopted where it can be clearly seen that the claim or answer is on the face of it 'obviously unsustainable'. (See *A-G of Duchy of Lancaster* v *L & NW Rly*.[18]) It has been said that the court will not permit a plaintiff to be 'driven from the judgment seat' except where the cause of

action is obviously bad and 'almost incontestably bad' (per Fletcher Moulton LJ in *Dyson* v *A-G*[19] at p 419).

Thirdly, the power to strike out any pleading or any part of a pleading under O 18 r 19 is not mandatory but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending plea (see *Carl Zeiss Stiftung* v *Rayner & Keeler Ltd (No 3)*[20]). So, for example, as a matter of discretion an action for a declaration that in the events which have happened a right of way has not been extinguished but is still exercisable will not be struck out as being an abuse of the process (see *Hampshire Country Council* v *Shonleigh Nominees Ltd*[21]).

In the present case, the main reliefs sought were by way of declaration and so I considered that quite apart from other considerations, I had a discretion as to whether or not to strike out the statement of claim, and having regard to the circumstances of the case as a whole, not forgetting the very serious allegations of conspiracy. I did exercise it by dismissing the two applications before me.

Fourthly, by the words 'frivolous and vexatious' are meant cases which are obviously frivolous or vexatious, or obviously unsustainable (per Lindley LJ in *A-G of Duchy of Lancaster* v *L & NW Rly*[18]). The pleading must be so clearly frivolous that to put it forward must be an abuse of the process of the court (per Jeane P in *Young* v *Holloway*[22] at p 90).

It must be self-evident from what I have thus far said, that on the face of the statement of claim, it is certainly arguable that the plaintiff has a reasonable cause of action against each of the defendants and that they have far from satisfied me that the statement of claim is frivolous or vexatious or that it is an abuse of the process of the court.

Lastly, I must consider the prayer for discharge of the interlocutory injunctions.

It was submitted by counsel for the fourth defendant, though not by counsel for the second, the third, and the fourth defendants, that the effect of the injunctions was to immobilize the fourth defendant and so, on the balance of convenience they should be discharged.

I was of the opinion that if the injunctions were discharged and the plaintiff were to succeed at the final hearing irreparable damage might be caused to the plaintiff and the acts of the fourth defendant as a trade union pending the hearing must surely be open to challenge. In all the circumstances, regard being had to the relevant circumstances, not forgetting the balance of convenience, the interests of all parties concerned and how best they might be protected, always keeping in mind the foreseeable positions at the final hearing, considerations of hardship in the meantime and other relevant discretionary factors, I was satisfied that there were sufficient grounds for continuing in force the injunctions, thus preserving the status quo until the plaintiff's claims are adjudicated upon by the court.

In the result, both the applications were dismissed with costs. On reflection, an early hearing ought to have been ordered and, to repair the omission, I do so now.

Applications dismissed.

Solicitors: *Mohideen & Asamaley; Nahappan, Dorairaj & Danker; Lim Cheng Poh, Lim & Rahim.*

Reported by *PS Ranjan*

Syawal Enterprise Sdn Bhd & Anor v Dayadiri Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO C4797 OF 1985
VC GEORGE J
11 MAY 1990

Civil Procedure — Authority to act — Whether solicitors who caused writ to be issued on behalf of plaintiff had been properly authorized by the plaintiff — Whether lack of authority of the solicitors to act can be challenged at present stage of proceedings — Who was to bear burden of proof that suit had been instituted with proper authority

Companies and Corporations — Right to instruct solicitors — Whether the plaintiffs' articles of association empowered minority shareholder to instruct solicitors — Rights of a beneficial owner of shares registered in nominee names

Agency — Ratification — Whether act done by solicitors without proper authority can be ratified by the plaintiff

A writ was taken out by a firm of solicitors holding themselves out as solicitors of the first plaintiff. Judgment in default of defence was entered against the defendant and an attempt to have the default judgment set aside failed. The defendant subsequently took out a summons-in-chambers seeking various orders and, in particular, sought to have the writ set aside or struck off pursuant to O 18 r 19 and/or under the inherent jurisdiction of the court on the ground that at all relevant times the firm of solicitors had no proper authority to cause the writ to be issued on behalf of the first plaintiff.

It was discovered that the firm of solicitors was instructed to act by one Soo Seng Chuan who, it was discovered, beneficially owned all the shares in the first plaintiff but was entered in the books of the first plaintiff as a minority shareholder only. The rest of the shares in the first plaintiff were held by two other Malay shareholders as nominees of Soo Seng Chuan in order to misrepresent the first plaintiff as a Bumiputra company. Soo Seng Chuan in fact managed the entire affairs of the first plaintiff and even appointed a board consisting of Malay directors 'for ceremonial purposes'.